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DIAMOND MCCARTHY LLP

909 Fannin, Suite 1500
Houston, Texas 77010
Telephone (713) 333-5100
Facsimile (713) 333-5199

Allan B. Diamond, TX State Bar No. 05801800
Email: adiamond@diamonddmccarthy.com
P. Jason Collins, TX State Bar No. 24040711
Email: jcollins@diamonddmccarthy.com

Special Litigation Counsel for USACM Liquidating Trust

LEWIS AND ROCA LLP

3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
Telephone (702) 949-8320
Facsimile (702) 949-8321

Rob Charles, NV State Bar No. 006593
Email: rcharles@lrllaw.com

Counsel for USACM Liquidating Trust

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

In re:
USA CAPITAL REALTY ADVISORS, LLC,

Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,

Debtor.

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

In re:
USA SECURITIES, LLC,

Debtor.

Affects:
☒ All Debtors
☐ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case Nos.:
BK-S-06-10725-LBR
BK-S-06-10726-LBR
BK-S-06-10727-LBR
BK-S-06-10728-LBR
BK-S-06-10729-LBR

JOINTLY ADMINISTERED
Chapter 11 Cases

Judge Linda B. Riegler

**SUPPLEMENTAL FILING IN
SUPPORT OF APPLICATION
TO COMPROMISE AND
SETTLE CONTROVERSIES
WITH PIERCY, BOWLER,
TAYLOR & KERN, PC**

Geoffrey Berman ("Berman" or the "Trustee"), Trustee of the USACM Liquidating Trust (the "USACM Trust") and Michael Tucker ("Tucker" or the "Manager"), Manager of the USA Capital Diversified Trust Deed Fund, LLC ("DTDF") hereby file this supplement in support of their Application to Compromise and Settle Controversies with Piercy, Bowler, Taylor & Kern, PC (the "Motion"). In accordance with the Court's instructions made during the hearing dated

November 18, 2008, the USACM Trust and DTDF have attached the following items for the Court's review and consideration: (i) the Settlement Agreement as Amended 12/10/08 between the USACM Trust, DTDF, and Piercy, Bowler, Taylor & Kern, PC ("PBTk") (attached hereto as Exhibit "A."); (ii) an amended declaration of Berman (attached hereto as Exhibit "B."); (iii) a declaration of Richard Bowler (attached hereto as Exhibit "C."); (iv) a declaration of Richard Bowler (attached hereto as Exhibit "D."); (v) amended proposed findings of fact and conclusions of law (attached hereto as Exhibit "E."); and (vi) an amended proposed order (attached hereto as Exhibit "F").

Wherefore, premises considered, USACM Trust and DTDF respectfully requests this Court approve the settlement between the USACM Trust, DTDF, and PBTk, and enter the amended proposed findings of fact and conclusions of law attached as Exhibit "E."

DATED this 10th day of December, 2008.

Respectfully Submitted:

DIAMOND McCARTHY LLP

By: /s/ Eric D. Madden
 Eric D. Madden, TX 24013079 (pro hac vice)
 P. Jason Collins, TX 24040711 (pro hac vice)
 J. Maxwell Beatty, TX 24051740 (pro hac vice)
 6504 Bridge Point Parkway, Suite 400
 Austin, Texas 78730
 (512) 617-5200 (telephone)
 (512) 617-5299 (facsimile)
Special Litigation Counsel for Plaintiffs

LEWIS AND ROCA LLP

By: /s/ Rob Charles
 Rob Charles, NB 6593
 3993 Howard Hughes Parkway
 Suite 600
 Las Vegas, Nevada 89169-5996
 (702) 949-8321 (telephone)
 (702) 949-8320 (facsimile)
Counsel for USACM Liquidating Trust

CERTIFICATE OF SERVICE

I hereby certify that, on December 10, 2008, notice of the foregoing filing was served either electronically or via first class mail to all existing and prospective defendants to any suits brought or to be brought by the USACM Trust and/or DTDF.

/s/ P. Jason Collins

P. Jason Collins

EXHIBIT A

EXHIBIT A FILED UNDER SEAL

EXHIBIT B

DIAMOND MCCARTHY LLP

909 Fannin, Suite 1500
Houston, Texas 77010
Telephone (713) 333-5100
Facsimile (713) 333-5199

Allen B. Diamond, TX State Bar No. 05801800
Email: adiamond@diamondmccarthy.com
Eric D. Madden, TX State Bar No. 24013079
Email: emadden@diamondmccarthy.com

Special Litigation Counsel for USACM Liquidating Trust

LEWIS AND ROCA LLP

3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
Telephone (702) 949-8320
Facsimile (702) 949-8321

Rob Charles, NV State Bar No. 006593
Email: rcharles@lrllaw.com

Counsel for USACM Liquidating Trust

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

In re:
USA CAPITAL REALTY ADVISORS, LLC,

Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,

Debtor.

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

In re:
USA SECURITIES, LLC,

Debtor.

Affects:
☒ All Debtors
☐ USA Commercial Mortgage Company
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Case Nos.:
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JOINTLY ADMINISTERED
Chapter 11 Cases

Judge Linda B. Riegler

**DECLARATION OF
GEOFFREY L. BERMAN IN
SUPPORT
OF MOTION TO APPROVE
SETTLEMENT - PBTK**

**DECLARATION OF GEOFFREY BERMAN IN SUPPORT
OF MOTION TO APPROVE SETTLEMENT - PBTK**

Geoffrey L. Berman, Trustee of the USACM Liquidating Trust (the "USACM Trust"),
hereby declares the following under penalty of perjury:

**DECLARATION OF GEOFFREY BERMAN
IN SUPPORT OF 9019 MOTION - PBTK**

Page 1 of 7

1 1. I am the Trustee of the USACM Trust created pursuant to the Third Amended
2 Joint Chapter 11 Plan of Reorganization (the "Joint Plan") filed by USACM, USA Capital Realty
3 Advisors, LLC, USA Capital Diversified Trust Deed Fund, LLC ("DTDF"), USA Capital First
4 Trust Deed Fund, LLC ("FTDF"), and USA Securities, LLC (collectively, the "Debtors") on
5 November 15, 2006. The plan was confirmed by order of this Court on January 8, 2007 and
6 became effective on March 12, 2007.

7 2. Pursuant to the Joint Plan, the USACM Trust was vested with all of USA
8 Commercial Mortgage's ("USACM") litigation claims and all of FTDF's assignable litigation
9 claims. This Court retained jurisdiction in Section VIII. D of the Joint Plan over numerous
10 matters, including "[h]earing and determining any and all adversary proceedings, motions,
11 applications, requests for disgorgement and contested or litigated matters arising out of, arising
12 under or related to the Chapter 11 Cases, including with out limitation the Litigation Claims and
13 the Non-Debtor Insider Litigation" and "[a]pproving compromises and settlements under Rule
14 9019 of the Bankruptcy Rules to the extent required under or included in the plan."

15 3. After I was appointed as the Trustee of the USACM Trust, I authorized an
16 extensive investigation as to the factual circumstances that led to USACM's bankruptcy. During
17 the course of this investigation, I discovered facts that give rise to litigation claims against
18 Piercy, Bowler, Taylor & Kern, PC ("PBTk"). I believe that PBTk failed to conduct its audits
19 of USACM in accordance with contractual and professional standards. This allowed certain
20 insiders to perpetrate a financial fraud on USACM, DTDF, and other related entities, thereby
21 leading to the loss of tens of millions of dollars.

22 4. As a result of these findings, I instructed counsel to contact PBTk about pre-suit
23 settlement discussions in December 2007. PBTk was advised that counsel had been instructed

1 to and had in fact drafted a law suit against PBTk that included claims related to accounting
2 malpractice/professional negligence and breach of contract. The USACM Trust and PBTk
3 participated in informal settlement discussions initially in February 2008 and again in late April
4 2008 related to these claims. Those discussions did not immediately result in a resolution of the
5 USACM Trust's claims against PBTk. However, the USACM Trust and PBTk continued to
6 discuss settlement for the period following those meetings. After extensive discussions,
7 meetings, and arms-length settlement negotiations, I ultimately agreed to a tentative settlement
8 with PBTk in May 2008. This agreement was memorialized in the *Settlement Agreement*,
9 *Mutual Release, and Covenants* that was entered into by and between the USACM Trust, DTDF,
10 and PBTk (the "Settlement Agreement").

11 5. I, along with Special Litigation Counsel, have analyzed the USACM Trust's
12 claims against PBTk and the Settlement Agreement. It is my considered judgment that the
13 Settlement Agreement with PBTk and the proposed settlement set forth therein are fair,
14 reasonable, and in the best interests of the USACM Trust and its beneficiaries for the reasons set
15 forth below. I have entered into the Settlement Agreement with PBTk in good faith after
16 weighing what I believe to be all relevant and material factors, including but not limited to the
17 amount of the proposed settlement; the strengths of the asserted claims and defenses; the costs
18 and burdens of litigation of the claims to judgment, including expert witness costs; the effect of
19 such litigation on the Trustee's litigation against other parties; the insurance policy limits and
20 insurance funds available to PBTk to pay the claims now and in the future and other potential
21 sources of payment by PBTk of the claims now and in the future; and the general uncertainty
22 involved in litigation of the claims.
23

PBTK CLAIMS

6. The USACM Trust entered into a tolling agreement with PBTK for the purpose of allowing the parties to continue discussions in an attempt to reach a compromise and settlement on these claims outside of formal litigation. These claims are for, among other things, accounting malpractice/professional negligence and breach of contract. The claims arise out of accounting services provided in connection with the audit of USACM's financial statements for the fiscal years ending in December 31, 2002 through December 31, 2005. For the years ending December 31, 2002 through December 31, 2004, PBTK issued unqualified audit opinions on USACM's financial statements. PBTK began audit work on the December 31, 2005 financial statements, but was unable to complete its services because USACM filed for bankruptcy protection during the pendency of the 2005 audit.

7. I believe that the USACM Trust's claims against PBTK have substantial merit and that PBTK bears substantial responsibility for USACM's losses. I have been advised that counsel for PBTK has strongly denied the validity of any such claims and any potential liability to the Trustee. In assessing the appropriate settlement in this matter, I have taken into account PBTK's assertions that the problems encountered in the audit were caused by USACM management and employees, and that the accuracy of the financial statements was the responsibility of management and not PBTK.

8. The USACM Trust has not filed suit against PBTK as of the date of this Declaration. I recognize that the claims against PBTK are complex, and would be expensive for both the USACM Trust and PBTK to litigate. I am also aware that the outcome of the case, like any other litigation outcome, is inherently uncertain and subject to risk.

1 9. The USACM Trust's attorneys and PBTk's attorneys agreed to informal
2 settlement discussions in an effort to resolve the claims, with my full knowledge and consent.
3 Two in-person meetings were conducted, neither of which resulted in an agreement. Further
4 discussion and negotiations between counsel for the USACM Trust and counsel for PBTk
5 ensued over the weeks that followed. The parties explored the merits of the claims and defenses,
6 and the complexity, expense, and unpredictability of the litigation of the claims against PBTk.
7 The USACM Trust, DTF, and PBTk reached a tentative agreement with respect to the
8 USACM Trust's claims against PBTk. The Settlement Agreement was signed after additional
9 months of dialog over the language in such agreement. The terms and conditions of the
10 proposed settlement are set forth in the Settlement Agreement.

11 10. The proposed settlement agreement with PBTk, in my judgment, is reasonable,
12 fair, and in the interests of the USACM Trust. The amount of the settlement is substantial in
13 light of the current stage of the case, the complexity, expense, and the risks and uncertainty of
14 litigation. I have entered into the proposed settlement in good faith, and there has been no
15 collusion or other improper conduct in connection with this proposed settlement to my
16 knowledge.

17 11. In assessing the appropriate settlement in this matter, I have also taken into
18 account that litigation against PBTk at this time would present additional expense to the
19 USACM Trust. I am not convinced that PBTk has the financial capability, through insurance or
20 otherwise, to pay a judgment that the Trustee would be likely to recover against it on the relevant
21 claims if in fact the USACM Trust were ultimately successful in litigating the PBTk claims
22 through trial. In connection with the settlement negotiations, PBTk's insurance carrier has
23 strongly asserted that there are meritorious coverage defenses under the relevant insurance

1 policies that may make all or some of the policy proceeds unavailable to pay any judgment the
2 Trustee may recover against PBTk. This settlement is significant relative to the total amount of
3 coverage PBTk has available for USACM's claims. Additionally, the settlement nearly exhausts
4 PBTk's available insurance coverage, and in light of potential coverage defenses, I believe it to
5 be reasonable.

6 12. In addition, litigation of the USACM Trust's claims against PBTk would be
7 complex, expensive, time-consuming, and the outcome of any such litigation would inherently
8 be uncertain. Any litigation of this claim would involve substantial costs related to discovery
9 alone as there are millions of pages of documents related to this claim, many witnesses that
10 would need to be deposed, and the claims would require the retention of multiple expert
11 witnesses.

12 13. There is a substantial benefit to the USACM Trust from resolving the claims
13 against PBTk now, without the necessity of lengthy litigation. I believe that the settlement
14 amount is within the reasonable range of likely outcomes from litigation in light of issues related
15 to the ultimate collectibility of any judgment against PBTk. In light of all of the relevant
16 factors, the proposed settlement with PBTk is reasonable, fair and in the best interests of the
17 USACM Trust, and will facilitate a prompt and meaningful recovery to the USACM Trust and
18 its beneficiaries.

19 **PROTECTION AGAINST THIRD-PARTY CLAIMS**

20 14. During the negotiations with PBTk, the protection of PBTk against the
21 possibility of claims for contribution or indemnity was a significant issue. PBTk wants
22 reasonable assurance that they will not be subject to such further claims and litigation arising
23 from many of the same events. Such claims for contribution or indemnity could conceivably be

1 asserted by current defendants in other cases related to the Debtors' bankruptcy, although none
2 have in fact been asserted to date.

3 15. Entry of an appropriate order protecting PBTk against the possibility of future
4 claims for contribution or indemnity will be of benefit to the USACM Trust, and will serve the
5 purposes of the Joint Plan by facilitating recoveries for the benefit of the beneficiaries of the
6 USACM Trust who have suffered loss as a result of the events leading to the Debtors'
7 bankruptcy.

8 USACM'S LOSSES

9 16. USACM lost in excess of \$70 million as a result of the fraudulent scheme,
10 exclusive of any interest or potential punitive damages. I believe that PBTk shares some
11 responsibility for these losses in an amount that could only be determined through discovery,
12 including expert analysis and opinions.

13 I DECLARE under penalty of perjury that the foregoing is true and correct and that this
14 declaration was executed on December 10, 2008.

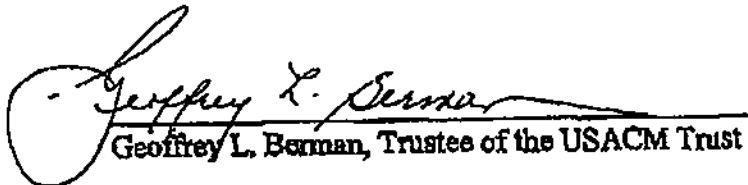
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17 Geoffrey L. Berman, Trustee of the USACM Trust
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EXHIBIT C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA
(LAS VEGAS DIVISION)

In re:
USA COMMERCIAL MORTGAGE COMPANY,
Debtor.

In re:
USA CAPITAL REALTY ADVISORS, LLC,
Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,
Debtor.

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,
Debtor.

In re:
USA SECURITIES, LLC,
Debtor.

Affects:

- ☒ All Debtors
☐ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Chapter 11

Jointly Administered Under

Case No. BK-S-06-10725 LBR

**DECLARATION OF RICHARD BOWLER
IN SUPPORT OF SETTLEMENT**

Date: December 23, 2008

Time: 11:00 a.m.

**Place: 300 Las Vegas Blvd. South
Las Vegas, Nevada**

Judge: Honorable Linda B. Riegle

DECLARATION OF RICHARD BOWLER

I, Richard Bowler, hereby swear under oath:

1. I am over the age of 18, and mentally competent, and I have knowledge of the facts in this matter and if called upon to do so, could and would testify:

2. I am a principal in the in the accounting firm of Piercy, Bowler Taylor and Kern ("PBT&K").

3. I was the principal at PBT&K in charge of the auditing performed for the USA Commercial Mortgage engagement. PBT&K was not engaged to audit DTDF and FTDF, the entities which raised money from the public and in which losses alleged have occurred.

1 4. PBT&K deny the all allegations of malpractice in accounting related negligence as
2 asserted by USACM LIQUIDATING TRUST and DTDF. Nevertheless it was determined to be in the
3 best interests of PBT&K to settle the case from proceeds provided by the insurance carrier for
4 PBT&K.

5 5. Allegations have been made as to the value of claims of the USACM Trust against
6 PBT&K to be in excess of \$30 million. Again, PBT&K denies any wrongdoing or liability for any of
7 the claims set forth by the Trust. However, PBT&K recognizes that a judgment in excess of the
8 applicable insurance coverage provided by the malpractice insurance carrier for PBT&K would be
9 financially disastrous.

10 6. Other than the insurance assets, PBT&K and its principals do not have the financial
11 capacity, through insurance or otherwise, to pay a judgment that the trustees might recover against it
12 on the relevant claims. PBT&K would not be in any position to fund any judgment in excess of the
13 aforesaid insurance.

14 7. Beyond the financial implications, the plain and simply fact is that there are minimal
15 assets available from PBT&K that would be available to satisfy any judgment.

16 I declare under penalty of perjury under the laws of the United States of America that the
17 foregoing is true and correct and that this declaration was executed on this 10th day of December 2008,
18 at Las Vegas, Nevada.

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Richard Bowler

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EXHIBIT D

**EXHIBIT D FILED
UNDER SEAL**

EXHIBIT E

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

Case Nos.:
BK-S-06-10725-LBR
BK-S-06-10726-LBR
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BK-S-06-10728-LBR
BK-S-06-10729-LBR

In re:
USA CAPITAL REALTY ADVISORS, LLC,

Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,

Debtor.

JOINTLY ADMINISTERED
Chapter 11 Cases

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

Judge Linda B. Riegler

In re:
USA SECURITIES, LLC,

Debtor.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW IN
SUPPORT OF ORDER
APPROVING SETTLEMENT
PIERCY, BOWLER, TAYLOR &
KERN PC**

Affects:
☒ All Debtors
☐ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

1 This Court, having considered the *Application to Compromise and Settle Controversies with*
2 *Piercy, Bowler, Taylor & Kern, PC* (the "Motion") and the Declarations of Geoffrey L. Berman and
3 Michael Tucker in support thereof and the arguments of counsel made at the hearing on the Motion to
4 Compromise held December 23, 2008; and

5 This Court having considered the Pleading in Support of the Motion to Compromise and the
6 arguments of counsel, now therefore makes the following findings of fact and conclusions of law under
7 Federal Rule of Civil Procedure 52 and Federal Rules of Bankruptcy Procedure 7052 and 9019.

8 1. Notice of the Motion ("Notice") was properly served on all creditors of the above-titled
9 estates.

10 2. The claims being settled are assets of the USACM Liquidating Trust (the "USACM
11 Trust"). Geoffrey L. Berman ("Berman" or the "Trustee") currently serves as a trustee of the USACM
12 Liquidating Trust.

13 3. The claims being compromised also belong to USA Capital Diversified Trust Deed
14 Fund, LLC ("DTDF"). Michael Tucker (the "Manager") is the manager of DTDF.

15 4. The beneficiaries of USACM Trust and DTDF are the creditors of USA Commercial
16 Mortgage Company ("USACM") and the interest holders in DTDF.

17 5. The claims being compromised herein arise from professional services rendered by
18 Piercy, Bowler, Taylor & Kern, PC ("PBTk") to USA Commercial Mortgage Company.

19 6. The USACM Trust and DTDF have investigated the merits of the claims against PBTk
20 and have conducted such investigation as they deemed reasonable into the merits of the claim. In
21 addition, the USACM Trust and DTDF have inquired into the complexity of proving the potential
22 claims, the expense of prosecuting such claims, the duration of litigation or other means for
23

1 prosecuting the claims, and have evaluated the difficulties of collection and the assets available for
2 satisfying any potential judgment.

3 7. Based upon this evaluation, the Trustee and the Manager have recommended this
4 compromise as fair and equitable.

5 8. The Compromise is fair and equitable to the USACM Trust.

6 9. The Compromise is fair and equitable to DTDF.

7 10. At the present time, no claims for indemnification or contribution have been asserted,
8 although the USACM Trust and DTDF have commenced litigation against persons and entities that
9 may have such claims.

10 11. At the present time, no claims have been asserted by creditors of any of the above-titled
11 estates against PBTk.

12 12. No USACM Trust beneficiary or DTDF interest holder has objected to this
13 compromise.

14 13. The amount paid in the settlement is fair and equitable in light of PBTk's insurance
15 policy limits and PBTk's financial condition.

16 14. There was no collusion, fraud, or tortious conduct in connection with the negotiation
17 and execution of the Settlement Agreement. No evidence was presented to this Court that there was
18 any collusion, fraud, or tortious conduct aimed to injure any non-settling defendants in connection with
19 the negotiation and execution of the Settlement Agreement.

20 15. The Settlement Agreement is in the paramount interest of the creditors.

21 **CONCLUSIONS OF LAW**

22 1. Notice has been given to all parties to the above-titled estates.

1 2. USACM Trust and DTDF have standing to assert the claims being settled and have
2 standing to bring this Motion.

3 3. In light of the complexity of the potential claims, the expense of litigating these claims,
4 the duration of such litigation, and the difficulties of collection in the event the estates are successful,
5 the settlement with PBTK is fair and equitable and reasonable under the circumstances and therefore is
6 approved under Federal Rule of Bankruptcy Procedure 9019.

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EXHIBIT F

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

Case Nos.:
BK-S-06-10725-LBR
BK-S-06-10726-LBR
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LLC,

Debtor.

JOINTLY ADMINISTERED
Chapter 11 Cases

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

Judge Linda B. Riegler

In re:
USA SECURITIES, LLC,

Debtor.

**ORDER APPROVING
SETTLEMENT WITH PIERCY,
BOWLER, TAYLOR & KERN,
PC**

Affects:
☒ All Debtors
☐ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

On December 23, 2008 this Court held a hearing on the *Application to Compromise and Settle Controversies with Piercy, Bowler, Taylor & Kern, PC* (the "Motion") filed by Geoffrey Berman

1 ("Berman" or the "Trustee"), Trustee of the USACM Liquidating Trust (the "USACM Trust") and Michael
2 Tucker ("Tucker" or the "Manager"), Manager of the USA Capital Diversified Trust Deed Fund, LLC
3 ("DTDF"). The Motion requested: (1) an Order Approving Settlement, and (2) for an Order pursuant to
4 Nevada Revised Statute §17.245, et seq. barring claims against Piercy, Bowler, Taylor & Kern, PC
5 ("PBTk") for indemnity and/or contribution. The relief requested is hereby GRANTED IN PART AND
6 DENIED IN PART.

7 Pursuant to the Motion and as set forth in the separate Findings of Fact and Conclusions of Law
8 entered pursuant to Bankruptcy Rules of Procedure 9014 and 7052, and Federal Rule of Civil Procedure 52,
9 this Court GRANTS the following relief:

10 1. The Settlement Agreement, Mutual Release, and Covenants dated July 18, 2008 between
11 the Trustee, the USACM Trust, the Manager, DTDF, and PBTk (the "Settlement Agreement") is approved
12 pursuant to Federal Rule of Bankruptcy Procedure 9019.

13 2. This Court shall retain jurisdiction to interpret and enforce the terms of the Settlement
14 Agreement and this Order Approving Settlement.

15
16 All other relief requested, including the request for a bar order pursuant to NRS § 17.245, is
17 DENIED.

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